PARVATHI & ANOR

v.

RAWANG HILLS RESORT SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
LOW HOP BING J
[CIVIL SUIT NO: 22-680-97]
7 OCTOBER 2002

CONTRACT: *Sale and purchase of land - Breach - Whether there was breach of agreement - Whether there was non-payment of balance of purchase price by first defendant - Whether second defendant entitled to register transfer upon payment of balance of purchase price to court-appointed stakeholder - Whether plaintiffs entitled to claim damages for loss of profits and earnings*

TORT: *Negligence - Duty of care - Whether solicitor acting for purchasers owed duty of care to vendors*

This was the plaintiffs' claim for damages for the loss of profits and earnings caused by the actions and omissions of each of the defendants in their joint and several failures, negligence, default and breach of the order dated 3 August 1995 ('the said order') and the provisions of the sale and purchase agreement dated 12 November 1991 ('the said agreement') in respect of certain land ('the said property') referred to therein. The issues that required determination by the court were whether: (1) the plaintiffs had established a breach of the said order and the said agreement by the first and second defendants respectively; and (2) the plaintiffs had established the tort of negligence against the second defendant. The plaintiffs submitted that the first defendant did not pay or cause the release of the balance of the purchase price upon registration of the transfer of the said property according to the terms and conditions of the said agreement. They also contended that since the court-appointed stakeholder, one Mohd Idris, had no practicing certificate, it was the second defendant's duty to appoint a stakeholder and a lawyer to release the said balance.

Held:

[1] In respect of the plaintiffs' case against the first defendant, it was clear from the said order that Mohd Idris' status as stakeholder was pursuant to an appointment by the court. It was an uncontroverted fact that the said

balance had been paid to Mohd Idris well within the 30-day time frame stated in the said order, and the memoranda of transfer were collected thereafter. Due notice had been given by the first defendant to the plaintiffs that the transfer had been registered and that the said balance could be collected, but the plaintiffs refused to accept the payment as they intended seeking a declaratory order that the said agreement was null and void. Furthermore, the court-appointed stakeholder was in a position to release the said balance. On the facts, the first defendant had performed its obligations in relation to the payment of the said balance pursuant to the said order and the said agreement. Therefore, there was no breach on the part of the first defendant. (p 550 c-e)

[2] In respect of the plaintiffs' case against the second defendant, there was nothing in the said agreement which could be construed as giving rise to the aforesaid duty on the part of the second defendant. On the facts, the said order directed the payment of the said balance to one Mohd Idris as the court-appointed stakeholder – irrespective of whether he had a valid practicing certificate – and this was complied with by the first defendant through the second defendant, in which case, the second defendant's respective obligations under the said order had been fulfilled. The duty was then on Mohd Idris as the stakeholder to release the said balance to the plaintiffs upon the registration of the transfer. On the other hand, the second defendant was entitled to register the transfer upon the payment of the said balance to Mohd Idris as the stakeholder for the plaintiffs. The two steps *viz* the payment of the said balance and the registration of the transfer had been duly effected by the second defendant. Hence, the second defendant was not in breach of the said order or the said agreement. (pp 551 d & 552 b)

[3] In respect of the plaintiffs' claim against the second defendant on the basis of negligence, it was trite law in Malaysia that the second defendant, as a solicitor acting for the purchaser, generally owed no duty of care to the plaintiffs (the vendors), who were professionally represented by their own advocates and solicitors at all relevant stages and material times. (p 552 d)

[Claim dismissed.]

Case(s) referred to:
Ayoung Chee v. Diaram Ramlakhan [1983] 33 WIR 377 ***(refd)***
Burt v. Claude Couins & Co Ltd & Anor [1971] 2 QB 426 ***(refd)***
Ellis v. Goulton [1893] 1 QB 350 ***(foll)***
Gran Gelato Ld v. Richcliff (Group) Ltd & Ors [1992] 1 All ER 865 ***(foll)***
Jones v. Barkley [1781] 2 Dougl 684 ***(refd)***

Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor [1983] 1 MLJ 256 HC ***(refd)***
White v. Jones [1995] 1 All ER 691 ***(foll)***

Legislation referred to:
Evidence Act 1950, s. 101(1), (2)

Other source(s) referred to:
Jackson & Powell On Professional Negligence, 1997, 4th edn, p 433 para 4-36

For the plaintiffs - Ashok K Raman; M/s Abu Talib Shahrom & Zahari
For the defendants - RR Sethu (Amirtha MC Pirapu); M/s PM Tan, Chan & Partners

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Plaintiff's Claim

The pleadings filed herein are somewhat complex. However, so far as may reasonably be ascertained, the plaintiffs' cause of action is based on a claim which has been set out in para. 31 thereof in the following words:

> 31. The plaintiffs claim damages for the loss of profits and earnings caused by the actions and omissions of each of the defendants in their joint and several failures, negligence, default and breach of the said Judgment dated 3.8.95 and the provisions of the said Agreement of Sale referred to therein.

The plaintiffs pleaded particularly the following reliefs against the first defendant:

> a) Rescission of contract and termination of the Sale & Purchase Agreement dated 12.11.91 in respect of the portions held by the First and Second Plaintiffs as on 16.4.96 in the proportion of 8/272 and 8/272 respectively being undivided shares in the said land held under partitioned title known as H.S. (D): 23942 P.T. No: 9234 Mukim of Rawang;
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> b) Cancellation and delivery up by the First defendant their nominee/ nominees/assignees/successors to the plaintiff of the said portions in the proportion of 8/272 and 8/272 respectively being undivided shares in the said land held under partitioned title known as H.S. (D): 23942 P.T. No: 9234 Mukim of Rawang from the Registry and the records of title, without any encumbrances whatsoever;

c) That the said portions held by the First and Second plaintiffs as on 16.4.96 in the proportion of 8/272 and 8/272 respectively being undivided shares in the said land held under partitioned title known as H.S. (D): 23942 P.T. No: 9234 Mukim of Rawang be effectively registered in the names of the First and Second plaintiffs forthwith;

d) That the First defendant and/or their nominee/nominees/assignees/ successors to execute the relevant Memorandum of Transfers in favour of the First and Second plaintiffs forthwith, failing which that the Senior Assistant Registrar or Deputy Registrar be empowered to execute the said Memorandum of Transfer in favour of the First and Second plaintiffs, their nominee/nominees/assignees/successor;

e) The Pendaftar Hakmilik Tanah Negeri Selangor be empowered and directed to cancel the registration in the name of the First defendant their nominee/nominees/ assignees/successor from the Registry of Title and expunge the names of the First defendant, their nominee/nominees/ assignees/successor from the records of title in the registry of Title on the said land known as H.S. (D): 23942 P.T. No: 9234 Mukim of Rawang, and in substitution register the names of the First and Second plaintiffs their nominee/nominees/assignees/successor in respect of their said portions in the proportion of 8/272 and 8/272 respectively being undivided shares in the said land held under partitioned title known as H.S. (D): 23942 Mukim of Rawang;

f) The plaintiffs to forfeit the deposit sum as stated in Section 4 of the First Schedule under the said Agreement of Sale dated 12.11.91 as agreed liquidated damages, and refund to the purchaser free of interest all such other sums paid by the First defendant on the vendors behalf pursuant to the terms of the said Agreement of Sale dated 12.11.91 and the said Judgment dated 3.8.95, and upon receipt of all such monies this Agreement shall be treated as null and void and of no further force and effect and neither party shall have any claim against each other over the said land and the Agreement dated 12.11.91 and the plaintiffs shall thereafter have the rights and liberty to deal and/or sell the said land to any other third party or parties.

g) Damages;

h) Costs;

i) Such other relief as this Honourable court deems fit and just to grant in the circumstances.

The plaintiffs particularised the second defendant's elements of negligence in para. 30 of the statement of claim, which reads:

Particulars of negligence of the Second defendant.

(a) Failing to secure the payment to the plaintiff according to the said Judgment dated 3.8.95;

(b) Failing to effect the payment to the plaintiffs in the mode and manner of the provisions of the said Agreement of Sale;

(c) Failing to seek the proper consequential and/or further directions from the courts;

(d) Failing to honour their position as Stakeholders;

(e) Failing to discharge their duties as Stakeholders;

(f) Failing to take the relevant steps and measures upon the complaint to the Bar Council Malaysia, as Stakeholders.

The plaintiffs specifically claim against the second defendant as follows:

a) Damages;

b) Costs;

c) Such other relief as this Honourable court deems fit and just to grant in the circumstances.

Agreed Facts

To ease the onerous burden of the court, respective learned counsel have achieved consensus on some of the facts which cover the chequered history of the multifarious proceedings involving the parties herein. I shall not attempt to compound the complexity of these agreed facts but merely reproduce the original version as signed by the respective learned counsel as follows:

1. The Plaintiffs, together with 25 others, entered into two sale and purchase agreements dated 12.4.1991 and 12.11.1991 with the 1st Defendant for the sale of their respective interests in the subject land. The relevant sale and purchase agreement in the present case is the agreement dated 12.11.1991. See pages 1-20 Agreed Bundle of Documents.

2. At the same time the Plaintiffs and the 25 other vendors had executed 27 memoranda of transfer in escrow for their respective interests in the subject land. These transfers were originally deposited with Messrs Tengku Mohamed Achan & Lim and subsequently with the 2nd Defendant as the 1st Defendant's solicitors, as stakeholders.

3. The Plaintiffs, together with the 25 others, filed a suit in the Shah Alam High Court *vide* CS 22-140-1994 ("First Suit') against the 1st Defendant for rescission of both the sale and purchase agreements. See pages 25 - 35 Agreed Bundle of Documents.

4. The 1st Defendant counterclaimed for specific performance of both sale and purchase agreements.

5. In the course of the trial, the 2nd Defendant, as solicitors of the 1st Defendant, were directed to deposit in Court the 27 memoranda of transfer pending the decision of the Court. The 2nd Defendant as the stakeholders complied with the direction depositing in Court, and marked as Exhibit P15 in the First Suit.

6. Whilst judgment was reserved in the First Suit after trial, and unknown to the 1st Defendant, the Plaintiffs and others entered into a sale and purchase agreement for the sale of their respective interests in the subject land to Tai Pan Pacific Capital Sdn Bhd ("Tai Pan"). Tai Pan lodged a caveat on the subject land on 17.11.1995 ("Tai Pan Caveat'). See pages 94A - 94B Agreed Bundle of Documents.

7. YA Dato' James Foong J on 3.8.1995 delivered judgment in the First Suit whereby he dismissed the Plaintiffs' claim and entered judgment for specific performance for the 1st Defendant. See pages 68-70 Agreed Bundle of Documents and see pages 71-83 Agreed Bundle of Documents.

8. By his Order and Judgment in the First Suit YA Dato' James Foong J dismissed the plaintiffs' claim and entered judgment for the 1st Defendant in the Counterclaim in the First Suit subject to the terms therein set out. Refer to the Judgment dated 3.8.1995. See pages 68 - 70 Agreed Bundle of Documents.

9. The 1st Defendant on 25.08.1995 duly paid the balance of the purchase price to Mohd Idris. See pages 319 - 320 Agreed Bundle of Documents.

10. The 2nd Defendant, as solicitors for the 1st Defendant, collected the issue document of title and the 27 memoranda of transfer.

11. Sometime in September 1995, the 2nd Defendant discovered that Mohd Idris had no practising certificate. The 2nd Defendant, as solicitors for and on behalf of the 1st Defendant, wrote to the Bar Council on 12.9.1995. See pages 322 - 323 Agreed Bundle of Documents.

12. The 1st Defendant on 13.09.1995 applied by summons in the First Suit for an order that Mohd Idris deposit the balance purchase price in Court. ("Payment Summons") See pages 84-91 Agreed Bundle of Documents.

13. M/s SB Cheah & Associates, as solicitors for the Plaintiffs and others, applied by affidavit, in response to the Payment Summons in the First Suit for payment of the balance purchase price to S B Cheah & Associates as the new solicitors/stakeholders for the Plaintiffs and others, in view of Mohd Idris' lack of sijil annual. See Affidavit of Chong Tzin Yern at pages 92 - 94 Agreed Bundle of Documents. The First Defendant did not consent to SB Cheah & Associates becoming stakeholders under the sale and purchase agreements.

14. No further steps were taken by Messrs PM Tan Chan & Partners and M/s SB Cheah & Associates in the Payment Summons in the First Suit because the Bar Council had taken its own proceedings in the Kuala Lumpur High Court *vide* OS No. R2-17-55-95 under the Legal Profession Act 1976 against Mohd Idris ("the Bar Council OS"). [Disputed By the Plaintiffs]

15. The plaintiffs and others applied to intervene in the Bar Council OS and were represented by M/s SB Cheah & Partners and Messrs Arun & Co and there was a dispute as to who represented whom.

16. M/s SB Cheah & Associates represented the present Plaintiffs and the 25 others in the Bar Council OS and applied for the balance of the purchase price to be paid over to them as stakeholders in place of Mohd Idris. See pages 129 - 131, 132 - 138 and 139 - 146 of the Agreed Bundle of Documents.

17. No orders for payment out of the balance of the purchase price were made in the Bar Council OS.

18. The application by the Plaintiffs and others for stay of execution through Messrs SB Cheah & Associates of the judgment in the First Suit pending appeal to the Court of Appeal was heard by YA Dato' Low Hop Bing J and was dismissed on 16.12.1995. A subsequent application by Messrs SB Cheah & Associates in the Court of Appeal for extension of time to file a record of appeal and stay of execution were also dismissed.

19. The 27 memoranda of transfer executed by the Plaintiffs and 25 others in favour of the 1st Defendant were presented on 1.2.1996 and subsequently rejected by the Registrar of Titles, Selangor.

20. The 1st Defendant on 13.3.1996 by Originating Motion No. 21-82-96 appealed to the High Court against the rejection. ("Land Appeal') See pages 153 - 161 Agreed Bundle of Documents.

21. Before the hearing of the Land Appeal scheduled for 30.3.1996, the Plaintiffs and others, through their then solicitors M/s Vasanthi Murugesan, by three letters, one dated 21.3.1996 and two dated 25.3.1996 purporting to rescind the two sale and purchase agreements and refund the deposits under clause 16 of the two sale and purchase agreements. The ground was the alleged rejection of the transfers by the Registrar of Titles. See pages 324 - 327 Agreed Bundle of Documents.

22. On 30.3.1996 the Plaintiffs and others, through M/s Vasanthi Murugesan, sought an Order *vide* their summons in chambers dated 27.3.1996 for intervention in the Land Appeal and to strike out the Land Appeal ("Intervention summons"). See pages 162 - 163 Agreed Bundle of Documents.

23. The Intervention Summons was supported by the affidavit of one of the vendors, one A Thanalecthumi, on the ground that the sale and purchase agreements had been rescinded under clause 16 based on the rejection of the transfers. See pages 164 - 168 Agreed Bundle of Documents.

24. At the hearing of the Land Appeal before YA Dato' Wahab Patail J, on 30.3.1996, the State Legal Adviser (representing the Registrar of Titles) and the 1st Defendant's solicitors entered into a consent order for the registration of the transfers with effect from 1.2.1996 ("the First Land Appeal Order"). See pages 170 - 171 Agreed Bundle of Documents.

25. The Plaintiffs and the applicants on the Intervention Summons withdrew the Intervention Summons. See page 169 Agreed Bundle of Documents.

26. The 1st Defendant's Summons in the Land Appeal dated 9.4.1996 was heard on 16.4.1996. See pages 172 - 173 of the Agreed Bundle of Documents.

27. The Plaintiffs and other applicants in Intervention Summons, through their new solicitors, M/s Murthi & Partners, wrote to the Registrar of Titles and the Senior Assistant Registrar, High Court of Shah Alam letters dated 15.4.1996 challenging the Land Appeal. See pages 174 - 175 Agreed Bundle of Documents.

28. On the same day, 15.4.1996 the Plaintiffs and the other applicants in the Intervention Summons, through M/s Murthi & Partners, lodged an appeal to the Court of Appeal against the First Land Appeal Order in the Land Appeal on the ground that YA Wahab Patail J refused to hear the Intervention Summons. See pages 176 - 178 Agreed Bundle of Documents. This appeal to the Court of Appeal was not proceeded with.

29. On 16.4.1996 YA Wahab Patail J amended the First Land Appeal Order in the Land Appeal ("the Second Land Appeal Order").

30. The transfers were registered on 17.4.1996 to take effect retrospectively from 1.2.1996 by the Registrar of Titles, Selangor in favour of the 1st Defendant pursuant to the First and Second Land Appeal Orders in the Land Appeal.

31. On 25.4.1996 the 2nd Defendants, as solicitors for the 1st Defendant, sent a letter to M/s Murthi 85 Partners, informing that they may deal with the balance of the purchase price pursuant to clause 5 of the sale and purchase agreement. See pages 328 Agreed Bundle of Documents.

32. Messrs Murthi 85 Partners, representing the Plaintiffs and the 25 others, replied by letter dated 30.4.1996 stating that their clients (including the Plaintiffs) will not accept the payment and were invoking clause 16 of the sale and purchase agreement. See page 330 Agreed Bundle of Documents.

33. Messrs. Murthi & Partners had also written to Malayan Banking Berhad by letter dated 25.4.1996 to put the said bank on notice, of the trust of the monies in the account of Mohd Idris & Associates and not to release monies without consent of the parties therein set out. See pages 342 - 343 Supplementary Bundle of Documents.

34. On 20.07.1996 the Plaintiffs and the 25 others filed in Kuala Lumpur High Court, *vide* Civil Suit No. S5-22-365-1996, against the 1st Defendant for rescission of the two sale and purchase agreements under clause 16 and for the registration of the transfer in favour of the 1st Defendant to be set aside ("the Second suit"). See pages 183 - 207 Agreed Bundle of Documents.

35. The present Plaintiffs lodged a private caveat against the subject land on 20.08.1996 ("Plaintiffs' First Caveat). See pages 279 - 283 Agreed Bundle of Documents.

36. M/s Shainuddin & Ranjit, as solicitors for Mohd Idris, provided confirmation of the funds with Mohd Idris to Searn Delamore & Co, solicitors for the Bar Council. See pages 332 - 333 Agreed Bundle of Documents.

37.1 By an undated letter (but received on 25.11.1996) M/s Murthi & Partners, as solicitors for the Plaintiffs and the 25 others, confirmed to M/s Shearn Delamore & Co the accuracy of the amount of the funds then with Mohd Idris. See page 334 Agreed Bundle of Documents.

37.2 The Judge in the Second Suit found as a fact that Messrs Murthi & Partners had by the letter referred to in paragraph 37.1, informed M/s Shearn Delamore that they will be applying for the sum to be paid to

their clients (including the Plaintiffs). See page 277 Agreed Bundle of Documents. [DISPUTED by Plaintiffs].

38. Messrs. Shearn Delamore & Co, solicitors for the Bar Council had by letter dated 3.2.1997 written to, *inter alia*, Messrs Murthi & Partners and the Second Defendant to notify that the Bar Council had issued a Sijil Annual to Mohd Idris and discontinued the Bar Council OS against Mohd Idris. See pages 335 - 336 Agreed Bundle of Documents.

39. YA Dato James Foong heard the Second Suit. One Mr. Subramaniam, the husband of the 1st Plaintiff and Ms Vasanthi Murugesan gave evidence for the Plaintiffs and the 25 others. See pages 227 - 252 Agreed Bundle of Documents.

40. Mohd Idris by letter dated 7.8.1997 addressed to M/s Murthi & Partners requesting the Plaintiffs and the others to come and collect the balance of the purchase price. See page 337 Agreed Bundle of Documents.

41. The trial of the Second Suit was concluded on 27.08.1997 and judgment was reserved.

42. The Plaintiffs and 22 others on 25.9.1997 filed a suit against Mohd Idris *vide* CS No. MT 4-22-487-1997 for the release of the balance of the purchase price by Mohd Idris ("the Idris Suit'). This was before delivery of judgment in the Second Suit (on 30.09.1997). See pages 307 - 316 Agreed Bundle of Documents. [DISPUTED by the Plaintiff].

43. YA Dato James Foong J delivered judgment in the Second Suit on 30.09.1997 YA Dato James Foong dismissed the Second Suit with costs. See pages 256 - 278 Agreed Bundle of Documents.

44. Mohd Idris had on 1.10.1997 written to both the present Plaintiffs that Mohd Idris would deposit the balance of the purchase price due to the present Plaintiffs in Court as requested by M/s Murthi & Partners. See pages 338 and 339 Agreed Bundle of Documents.

44A. By a separate letter dated 1.10.1998 Mohd Idris notified the 2nd Defendants, as solicitors for the 1st Defendant, that Mohd Idris is still stakeholder of the balance purchase price for the present plaintiffs. (Loose copy).

45. The 1st Defendant by Originating Summons No. S5-24-797-1997 on 4.10.1997 applied to remove the Plaintiffs' First Caveat.

65. On 15.10.1997, the Plaintiffs and 25 others lodged an appeal to the Court of Appeal *vide* Civil Appeal No. W-02-628-1997 against the decision in the Second Suit ("the Second Appeal").

47. Unknown to the 1st Defendant, after service of the Originating Summons referred to in para 47, the 1st Plaintiff lodged another caveat on 17.10.1997 against the subject land ("the Plaintiffs' Second Caveat'). See pages 284 - 285 Agreed Bundle of Documents.

48. YA Dato James Foong J ordered the removal of the Plaintiffs First Caveat on 20.10.1997. See pages 286 - 288 Agreed Bundle of Documents.

49. The transfers of the subject land by the 1st Defendant to Magnum Corporation Bhd and Cempaka Madu Sdn Bhd were presented on 29.10.1997. See pages 21 - 24 Agreed Bundle of Documents [DISPUTED by the Plaintiffs].

50. The 1st Defendant applied on 4.11.1997 to remove the Plaintiff's Second Caveat. YA Dato James Foong J on 26.11.1997 ordered the removal of the Plaintiffs' Second Caveat. See pages 289 - 291 Agreed Bundle of Documents. [DISPUTED by the Plaintiffs].

51. The transfers in favour of Magnum Corporation Bhd and Cempaka Madu Sdn Bhd were registered with effect from 29.10.1997. See pages 21 - 24 Agreed Bundle of Documents. Both these two companies are not before this Court as parties. [DISPUTED by the Plaintiffs].

52. In the Idris Suit, the Plaintiffs and 22 others on 26.11.1997 obtained an Order that Mohd Idris deposit the balance of the purchase price (with Mohd Idris) with Maybank Finance Bhd by Mohd Idris in his firm's name but that the receipt be deposited with M/s Murthi & Partners. This Order also restrained any dealing with the funds without consent of the Bar Council, M/s Murthi & Partners (as solicitors for Plaintiffs) and Mohd Idris. See pages 316A - 316B Agreed Bundle of Documents. [DISPUTED by the Plaintiffs].

53. Mohd Idris on 24.12.1997 notified the 2nd Defendants as solicitors of the 1st Defendant that Plaintiffs and 19 others had refused to collect the balance of purchase price pending the Second Appeal. See pages 340 - 341 Agreed Bundle of Documents. [DISPUTED by the Plaintiffs]

54. The Plaintiffs filed the present suit on 29.12.1997 ("the third Suit") against the 1st and 2nd Defendants.

55. The Court of Appeal on 15.6.1999 dismissed the Second Appeal with costs. See pages 304 - 306 Agreed Bundle of Documents. No application for leave to appeal to the Federal Court was filed.

***Viva Voce* Evidence Of Witnesses**

In addition to the aforesaid agreed facts, the parties have adduced evidence on their own and through their witnesses. Harking back to first principles, it is to be noted that the burden of proof lies on the person who desires any court to give judgment as to any legal right or liability on the existence of facts which he asserts, and he must prove that those facts exist. This is a restatement of the fundamental principle of evidence that he who alleges must prove it affirmatively: s. 101(1) and (2) of the Evidence Act 1950. In the instant case, the burden of proof is on the plaintiffs.

For convenience, a reference to the said agreement hereinafter shall be a reference to the sale and purchase agreement dated 12 November 1991.

The first plaintiff who testified as PW1 said that she did not accept the balance of the purchase price as it was never secured and made available for payment to the plaintiffs according to the terms and conditions of the said agreement, and that she was going under cl. 16 thereof to nullify it on grounds of non-registration of the memoranda of transfer (collectively referred to as "the transfer"). She said that there was no stakeholder and hence she left the money with Messrs Mohd Idris & Associates on behalf of P.M. Tan.

PW1 added that the second defendant as solicitors had failed to discharge their duties as such when the second defendant effected the transfer of the said property in favour of the first defendant in total disregard of the terms and conditions of the said agreement, and that the plaintiffs have suffered losses in that there was an offer from one Tai Pan Pacific Sdn Bhd to which the sale would have given each of the plaintiffs a sum of RM924,806. There was, according to PW1, yet a subsequent offer from one Morgan & Co at which each of the plaintiffs would have obtained RM1,460,000.

Evidence adduced for the plaintiffs also revealed that upon the registration of the transfer, the first defendant had given notice to the plaintiffs' then solicitors Messrs. Murthi & Partners that the balance of the purchase price (the "said balance") can be collected, but the plaintiffs refused to accept the payment from the account of PW2, "advocate and solicitor" En. Mohd Idris who was a court-appointed stakeholder in the absence of a practising certificate and his status as stakeholder has been accepted by PW1 in her evidence. PW2 testified that the plaintiffs wanted to invoke cl. 16, seeking, as stated above, to nullify the said agreement.

PW2 confirmed that he was in a position to release the said balance to the vendors *viz* the plaintiffs at the material time and agreed that under the terms

of the Order appointing him as stakeholder, the defendants' liability to the plaintiffs was discharged after the said balance had been paid to his firm. He stressed that neither the first defendant (as purchaser) nor the second defendant (as the purchaser's solicitors) had ever prevented him from making payment of the said balance to the plaintiffs (as the vendors). He agreed that after the lifting of the injunction, it was his obligation as stakeholder to pay the said balance upon registration of the transfer. However, shortly after the registration of the transfer, the plaintiffs' solicitors Murthi & Partners on behalf of the plaintiffs disclaimed any interest in the said balance, again by reason of cl. 16 of the said agreement.

The plaintiffs had, through their solicitors Messrs Murthi & Partners, treated the said balance as the plaintiffs' funds, when PW2 rendered an account thereof to the plaintiffs' said solicitors who had duly confirmed that the said balance would be paid to their clients *viz* the plaintiffs.

In respect of the plaintiffs' case against the 2nd defendant, the first plaintiff testified that since En Mohd Idris had no practising certificate, it was the second defendant's duty to appoint a stakeholder and a lawyer to release the said balance.

Submissions By Counsel And Court's Decision

It is to be observed that multifarious issues were raised by En Ashok K Raman, learned counsel for the plaintiffs, and Dato' R R Sethu, assisted by Cik Amirtha, both learned counsel for the defendants. Since a full hearing has been launched and completed, it is my considered view that the suit herein should be determined on the basis of the merits and substantial justice of the case.

In my judgment, the agreed facts, the *viva voce* evidence adduced for the parties herein and the respective submissions of learned counsel have crystallised the questions for determination by the court as follows:

1. whether the plaintiffs have established a breach of the said Order and the said agreement by the first and the second defendants respectively;

2. alternatively, whether the plaintiffs have established the tort of negligence against the second defendant?

For the plaintiffs, it was submitted that the first defendant did not pay or cause the release of the said balance upon registration of the transfer, whereas the contention for the first defendant was that there was no breach of the said agreement or Order of the court by the first defendant.

In my view, the issue raised herein concerns the construction to be placed on the terms of the Order of the court dated 3 August 1995 which reads as follows:

> ADALAH DIHAKIMKAN bahawa tuntutan Plaintif-Plaintif ditolak dengan kos tindakan ini dibayar oleh Plaintif-Plaintif kepada Defendan DAN ADALAH SELANJUTNYA DIHAKIMKAN bahawa tuntutan balas Defendan untuk pelaksanaan spesifik Perjanjian-perjanjian Jual-beli bertarikh 12 haribulan April 1991 dan 12 haribulan November 1991 dan di antara plaintiff-plaintif dan Defendan dibenarkan dengan kos tuntutan balas defendan dibayar oleh Plaintif-Plaintif kepada Defendan dan ADALAH JUGA DIHAKIMKAN bahawa tuntutan balas Defendan untuk gantirugi khas dan gangirugi umum ditolak.
>
> DAN ADALAH DIPERINTAHKAN bahawa Memorandum-memorandum Hakmilik yang ditanda sebagai eksibit P15 (1-27) dikembalikan kepada Peguamcara Defendan, Tetuan PM Tan, Chan & Partners yang harus menyimpannya sebagai pemegang amanah sehingga baki harga pembelian dibayar oleh Defendan kepada peguamcara Plaintif- Plaintif Tetuan Mohd Idris & Associates dalam tempoh 30 hari dari tarikh perintah ini menurut cara yang ditetap dalam Perjanjian-perjanjian Jual-beli tersebut. ADALAH SELANJUTNYA DIPERINTAHKAN bahawa sekiranya Defendan gagal membayar baki harga pembelian sedemikian dalam tempoh 30 hari ini, Plaintif-Plaintif adalah berhak menamatkan Perjanjian-perjanjian Jual-beli tersebut di bawah Klausa 12 Perjanjian-perjanjian tersebut DAN ADALAH JUGA DIPERINTAHKAN bahawa sebaik sahaja Defendan membayar baki harga pembelian kepada Peguamcara Plaintif-Plaintif tersebut, Defendan adalah berhak mendapatkan dari Pendaftar Hakmilik Tanah dokumen hakmilik keluaran iaitu Suratan Hakmilik Sementara untuk ... .
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> [My translation:
>
> IT IS ADJUDGED that the Plaintiffs' claim be dismissed with costs of the action herein to be paid by the Plaintiffs to the Defendant and IT IS FURTHER ADJUDGED that the Defendant's counterclaim for specific performance of the Sale and Purchase Agreements dated 12 April 1991 and 12 November 1991 and between the Plaintiffs and the Defendant be allowed with costs of the Defendant's counterclaim to be paid by the Plaintiffs to the Defendant and IT IS ALSO ADJUDGED that the Defendant's counterclaim for special damages and general damages be dismissed.
>
> AND IT IS ORDERED that the Memoranda of Transfer which was marked as exhibit P15 (1-27) be returned to the Defendant's solicitors Tetuan P.M. Tan, Chan & Partners who shall hold as stakeholders (trustee) until the balance of the purchase price has been paid by the Defendant to the Plaintiffs' solicitors Tetuan Mohd Idris & Associates within the period of 30 days from the date of this Order in accordance with the mode prescribed in the said

> Sale and Purchase Agreements. IT IS FURTHER ORDERED that should the Defendant fail to pay the balance of the purchase price within the said period of 30 days, the Plaintiffs are entitled to terminate the said agreements under clause 12 of the said agreements AND IT IS ALSO ORDERED that as soon as the Defendant pays the balance of the purchase price to the said solicitors of the Plaintiffs, the Defendant is entitled to obtain from the Registrar of Titles the issue document of title ie, Qualified Title. ...

The "defendant" referred to in the said Order is the first defendant in the suit before me.

It is clear from the said Order that En Mohd Idris' status as stakeholder is pursuant to an appointment by the court. It is an uncontroverted fact that the said balance has been paid to En Mohd Idris on 25 August 1995 well within the 30-day time frame stated in the said order and the memoranda of transfer were collected thereafter. Due notice has been given by the first defendant to the plaintiffs' then solicitors Messrs Murthi & Partners that the transfer has been registered and the said balance can be collected, but the plaintiffs refused to accept the payment, as the plaintiffs intended to invoke cl. 16 of the said agreement to seek a declaratory order that the said agreement was null and void.

Further, the court-appointed stakeholder was in a position to release the said balance. It is my specific finding that the first defendant had performed its obligations in relation to the payment of the said balance pursuant to the said Order and the said agreement. I therefore hold that there was no breach on the part of the first defendant.

In my view, it was the plaintiffs who have refused to accept payment of the said balance and so, they cannot be heard to complain of non-payment: *Jones v. Barkley* [1781] 2 Dougl. 684, 695; 99 Eng Rep 434, 440 per Lord Mansfield CJ, as applied by Sir Robert Megarry in delivering the judgment of the Privy Council in *Ayoung Chee v. Diaram Ramlakhan* [1983] 33 WIR 377, 401.

The status of En Mohd Idris as a court-appointed stakeholder can never be doubted, as he has neither been removed nor replaced in this capacity. That being the case, En Mohd Idris held the said balance as stakeholder for the plaintiffs. Further, the plaintiffs have as alluded to above, through the first plaintiffs evidence, treated and accepted En. Mohd Idris as their stakeholder. It is pertinent to point out that all the other vendors (who have sold their respective shares in the said property to the first defendant) have collected their balance from En. Mohd Idris.

It is also pertinent to observe that after the dismissal of the second suit, the plaintiffs have entered private caveats against the said property on ground of non-payment of the said balance. The first plaintiff PW1 admitted that the said caveats have been removed by order of the court, which means that the plaintiffs' aforesaid ground of nonpayment of the said balance is unmeritorious.

In attempting to establish their claim against the second defendant, PW1 testified that "since Mohd Idris had no practising certificate it was the duty of PM Tan to appoint a stakeholder and a lawyer to release the money". It was contended for the plaintiffs that the second defendant owed the plaintiffs such a duty. The stand taken by learned counsel for the second defendant is that the second defendant owed no such duty to the plaintiffs who were represented throughout by their own solicitors.

In my considered opinion, there was nothing in the said agreement which could be construed as giving rise to the aforesaid duty on the part of the second defendant. Under the terms of the order dated 3 August 1995, the second defendant was a stakeholder of the 27 memoranda of transfer until the payment of the said balance, which the first defendant has paid through the second defendant before the second defendant collected the memoranda of transfer from the court. The said order directed the payment of the said balance to En Mohd Idris as the court-appointed stakeholder and that has been complied with by the first defendant through the second defendant, in which case, their respective obligations under the said agreements and more importantly under the said order have been fulfilled. The duty is then on En Mohd Idris as the stakeholder to release the said balance to the plaintiffs upon the registration of the transfer, in line with the duty of a stakeholder ie, a person who receives money and holds it *in medio* pending the outcome of a future event: *Burt v. Claude Couins & Co Ltd And Another* [1971] 2 QB 426 @ p. 435 per Lord Denning MR and applied by Wan Hamzah, J (later SCJ) in *Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor* [1983] 1 MLJ 256 at p. 239C-D right.

On the other hand, the second defendant being the stakeholder of the 27 memoranda of transfer is entitled to register the transfer upon the payment of the said balance to En Mohd Idris as the stakeholder for the plaintiff. The two steps *viz* the payment of the said balance and the registration of the transfer have been duly effected by the second defendant. This is, in my view, consistent with cl. 3(b) of the said agreement which reads as follows:

> The Memorandum of transfer (Form 14A) shall be presented to the relevant Land authority for Registration in favour of the Purchaser and/or their nominees or assignees ONLY AFTER the Purchaser's Solicitors have deposited the Balance Purchase Price with the Vendor's solicitors as STAKEHOLDERS.

The incompetency of En Mohd Idris on the ground of his not being in possession of a valid practising certificate has been heavily relied on by the plaintiffs. In my view, the proper perspective is that En Mohd Idris has at all material times been appointed by the court as a stakeholder for receiving the said balance and holding it *in medio* pending the registration of the transfer. The said balance of the purchase price was to be released by the stakeholder pursuant to cl. 5(c) of the said agreement. Hence, I hold that contractually, the second defendant was not in breach of the said order or the said agreement.

On the plaintiffs' claim against the second defendant on the basis of negligence, it is essential to state that the plaintiffs bear the burden of establishing the crucial element of duty of care owed by the second defendant to the plaintiffs.

The second defendant is clearly the first defendant's (purchaser's) solicitors while the plaintiffs are the vendors. In such a conveyancing transaction, it is, in my judgment, trite law in Malaysia that the second defendant as solicitors acting for the purchaser generally owed no duty of care to the plaintiffs (the vendors), who were professionally represented by their own advocates and solicitors at all relevant stages and material times. In the United Kingdom, this proposition of law has been stated with complete clarity by Sir Donald Nicholls V-C in *Gran Gelato Ltd v. Richcliff (Group) Ltd & Ors* [1992] 1 All ER 865 at p. 872h to p. 873a, as follows:

> In my view, in normal conveyancing transactions solicitors who are acting for a seller do not in general owe to the would-be buyer a duty of care when answering inquiries before contract or the like. In reaching the conclusion that the law should not generally import a duty of care in such circumstances, three factors have weighed with me. The first lies in the context in which such representations are made. The context is a contract for the sale of an interest in land. They buyer is formally seeking information from the seller about the land and his title to it. The answers given by the solicitor are given on behalf of the seller. The buyer relies upon those answers as answers given on behalf of the seller, although the confidence of the buyer and his solicitors in the reliability of the answers may be increased when they see the answers have been given by a solicitor in the ordinary way. They will expect the seller's solicitor, as a professional acting on behalf of his client, to have got the answers right. I venture to think that in these circumstances one would expect to find that the law provides the buyer with a remedy against the seller if the answers were given without due care. I am far from persuaded that the fair and reasonable reaction to these facts is that there ought also to be a remedy against the other party's solicitor personally.

(See also *Jackson & Powell On Professional Negligence*, 1997, 4th edn, p. 433 para 4-36).

Closer to our shores, in Singapore, Rubin J in following the principles enunciated in *Ellis v. Goulton* [1893] 1 QB 350 and *White v. Jones* [1995] 1 All ER 691, said that "the general rule today is that, subject to his duties to the court and the professional duties imposed upon his profession, a solicitor when acting for his client owes no duty to third parties.

In the light of the foregoing grounds, I hold that the plaintiffs have failed to prove their claim against the first and second defendants.

I therefore dismiss the plaintiffs' claim with costs, but I would hear further arguments from learned counsel pertaining to the issue of a certificate for the costs of two counsel, in view of its practical importance to the legal profession generally.